INDEX

CITATIONS

696382—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 78–80) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1946 (R. 81). The petition for a writ of certiorari was filed April 27, 1946. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23; 50 U. S. C. App., Supp. IV, Sec. 924 (d), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether the court below erred in applying the doctrine of *res judicata* to petitioner's contention that Maximum Price Regulation No. 422, as amended, discriminates illegally against petitioner on the ground that it does not permit petitioner to include, when computing prices, an allowance for its pre-retail functions equal to the entire amounts received by independent wholesalers for performing pre-retail functions.

2. Whether the court below erred (1) in holding that the burden was on petitioner to support with evidence its contention that the allowance permitted by Maximum Price Regulation No. 422, as amended, for pre-retail functions was so inadequate as to render the regulation not generally fair and equitable, and (2) in holding that petitioner had wholly failed to meet that burden of proof in the case at bar.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the Emergency Price Control Act of 1942, as amended, and the pertinent parts of Maximum Price Regulation No. 422, as amended, are set forth in the Appendix, *infra,* pp. 17–32.

STATEMENT

Maximum Price Regulation No. 422, *infra,* pp. 26–32, issued by the Price Administrator under the authority of Section 2 of the Emergency Price Control Act of 1942, *infra,* pp. 17–20, establishes

maximum prices for groceries sold by all chain food stores and by independent food stores having annual sales amounting to $250,000 or more.[1] This regulation, issued on July 8, 1943, prescribes maximum mark-ups, derived from the historical margin experience of each group of stores, which may be added to the net cost of each item purchased by such stores.

Petitioner operates as a single corporate entity approximately 2,300 retail food stores in the United States (R. 2). On various dates prior to June 1, 1944, petitioner filed two series of protests with the Price Administrator. One of the series attacked the adequacy and fairness of mark-ups available to chain food stores under Maximum Price Regulation No. 422, on the grounds that such mark-ups did not compensate petitioner for pre-retailing functions performed by it, and that the mark-ups discriminated against petitioner and other retail chain food stores, in that such integrated distributors received smaller mark-ups than the total mark-ups available to independent wholesalers and retailers. The other series of protests attacked the validity of the basic classifications of retail food stores included in the several food price regulations. On June 1, 1944, all of these protests were finally denied by the Price

[1] A companion regulation, Maximum Price Regulation No. 423, prescribes maximum prices on grocery products sold by Group 1 and 2 stores, which are independent food stores having annual sales amounting to less than $50,000 and $200,000, respectively. 10 F. R. 1523.

Administrator to the extent that relief had not been granted by certain amendments with respect to the issues involved in the first group of protests while the protest proceedings had been pending. Thereafter, two complaints embodying these protests which had been filed by petitioner in the Emergency Court of Appeals were consolidated and considered by that court (R. 17). On November 29, 1944, the Emergency Court of Appeals dismissed both complaints, holding, *inter alia,* that the mark-ups provided for retailers by Maximum Price Regulation No. 422, which included allowances for pre-retail functions, were generally fair and equitable and did not discriminate against petitioner and other integrated chain retailers. See *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 836, certiorari denied, 324 U. S. 847.

Subsequent to the time the two series of protests involved in the case cited above had been filed, the Price Administrator amended Section 20 of Maximum Price Regulation No. 422 by adding thereto a new subsection (p), *infra,* pp. 29–30, (hereinafter referred to as Amendment No. 32), wherein retailers making large quantity purchases of fresh fruits and vegetables at an early stage of the distribution process, were permitted to add 1½% to the net cost bases to which maximum mark-ups were applied (R. 17). The allowance was established at 1½% on the basis of figures submitted to the Administrator by integrated food chains (R. 52). On July 24, 1945, peti-

tioner filed the protest involved in the case at bar in which it attacked the validity of Amendment No. 32 on the grounds that the 1½% additional allowance for pre-retail functions was inadequate to represent fair and equitable compensation, and that the Amendment was, in effect, discriminatory, because it did not place retailers who perform pre-retail functions in the same postion with respect to ceiling prices as other retailers who obtained their supplies at a later stage in the distribution process (R. 2–3). On November 7, 1945, the Price Administrator denied the protest, holding that the issues raised by the protest with respect to discrimination were basically the same as those raised by petitioner in the prior proceeding which had been finally determined by the Emergency Court of Appeals in *Safeway Stores, Inc.* v. *Bowles, supra* (R. 19). The Administrator further held, on the merits of the issue of the adequacy of the allowance, that the petitioner had adduced no evidence to show the inadequacy of the 1½% allowance permitted by Amendment No. 32 (R. 32).

Petitioner thereupon filed a complaint in the Emergency Court of Appeals against the denial of its protest to Amendment No. 32 (R. 62–68). On March 29, 1946, that court, after hearing, dismissed the complaint, holding that petitioner's charge that the regulation discriminated against it was barred by principles of *res judicata,* and that petitioner had failed to meet its burden of

proof that the 1½% allowance permitted by Amendment No. 32 was so inadequate as to render the regulation not generally fair and equitable (R. 79–80). The petition here seeks a review of the judgment of March 29, 1946.

ARGUMENT

1. Petitioner contends that the court below erred in applying the doctrine of *res judicata* to its claim that Maximum Price Regulation No. 422, as modified by Amendment No. 32, works a discrimination against integrated chain food stores which purchase fresh fruits and vegetables at an early stage in the process of distribution. On this point petitioner argues that its objections to Amendment No. 32 could not have been adjudicated in the prior proceeding (*Safeway Stores, Inc.* v. *Bowles, supra*), because that Amendment was promulgated subsequent to the time the protests there involved were filed (Pet. 12–14).

The statements made by the court below in its opinion in the prior case show clearly the issue raised by petitioner in that case with respect to the alleged discriminatory features of Maximum Price Regulation No. 422 in connection with allowances made therein for pre-retail functions. In the course of its opinion in the prior case the court below said:

> The third question raised by the complainant is as to the adequacy of the mark-ups established by the Administrator to compensate the complainant for expenses

incurred by it in the performance of so-called "pre-retail" functions. The complainant is a retailer but has widened the field of its activities to include many of the functions ordinarily performed by commission merchants or brokers, carlot distributors and service wholesalers. Thus it purchases much of its fresh fruits and vegetables directly from the growers and for that purpose establishes and maintains seasonal buying and shipping offices close to the source of supply. It performs all the functions necessary to preserve and transport these commodities in saleable condition. It maintains its own warehouses in many sections of the United States. At these warehouses it receives and inspects all supplies of fresh fruits, vegetables, canned food and packaged food. It cares for and stores these foods, assembles the orders received from its retail stores, loads them on trucks and makes deliveries. It sorts, trims, and bags the fresh fruits. * * *

The complainant contends that the mark-ups permitted by MPR 422 fail to compensate it for expenses incurred by it in performing many of the above enumerated functions both before and after the commodities are received in the warehouses. It urges, moreover, that the denial of compensation for such services is particularly discriminatory because others are given allowances for identical functions and services by MPR 271, MPR 421 and MPR 426,

696382—46——2

> each of which has been ruled to be inapplicable to the complainant because it as a corporation does not "sell" to its own retail stores. (145 F. 2d at 842; R. 25–26.)[2]

Contrary to the impression which petitioner apparently seeks to convey, the court below in the case at bar did not apply the doctrine of *res judicata* to petitioner's objections to Amendment No. 32 beyond the point where those objections attacked the historical price-differential factors which form the basic structure of Maximum Price Regulation No. 422. This is shown by the following excerpt from the opinion in the case at bar, wherein the court observed that:

> The complainant's other objection is that the allowance of 1½% is inadequate to compensate it for the performance of the functions which that allowance was designed to cover. Since Amendment 32 was adopted after the filing of the complainant's earlier protests no estoppel to raise this objection can arise. (R. 79.)

Instead, the court held that the objections grounded on discrimination which petitioner in words directed at Amendment No. 32, were in

[2] MPR 271 (potatoes and onions) and MPR 426 (all other fresh fruits and vegetables for table consumption which are subject to price control) govern sales by growers, country shippers and all independent intermediate sellers, including wholesalers or secondary jobbers. MPR 421 (dry groceries) covers only sales by independent wholesalers to retail stores. These regulations are printed in the Federal Register. See 8 F. R. 7017, 11 F. R. 3864; 8 F. R. 9546, 10 F. R. 8021; and 8 F. R. 9388, 10 F. R. 1496, respectively.

reality directed at the basic structure of Maximum Price Regulation No. 422, and that they were in substance the same as those presented, and found to be without merit, in the prior proceeding between the same parties.[3]

While it is true that the allowance permitted by Amendment No. 32 was not involved in the prior case, it is plain that the objections which petitioner now raises against the alleged discriminatory features of that Amendment, are not in reality against the provisions added to the regulation by that Amendment, but are objections to one of the basic principles which was inherently a part of Maximum Price Regulation No. 422 both before and after the Amendment was added, i. e., application to price control of the historical differentials in the price structures of the various classes of food stores.[4]

In the prior case, petitioner, while attacking the validity of several price regulations relating to

[3] As stated by the court below (R. 79), there is privity between Price Administrator Paul A. Porter, who is respondent herein, and Chester Bowles, his predecessor in office who was respondent in the prior case, so that the lack of identity of the parties does not prevent the application of the rule of *res judicata*. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402–403.

[4] The opinion of the Emergency Court of Appeals in the prior case shows that the mark-ups chosen by the Administrator were based upon an exhaustive study of historical food margins made for him by the Bureau of Labor Statistics of the Department of Labor. *Safeway Stores, Inc.*, v. *Bowles*, 145 F. 2d 836, 839.

food, including Maximum Price Regulation No. 422, asserted that the latter regulation was discriminatory on the ground that it made no provision to compensate petitioner for pre-retail functions performed by it, and demanded that petitioner be accorded not only retail mark-ups but also those provided for independent wholesalers (R. 39–42). Petitioner's contention was found to be without merit for the reason that the margins embodied in the regulations themselves reflected the historical margins of the integrated chains for both wholesaling and retailing. *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d at 843. In the case at bar, petitioner contends that Maximum Price Regulation No. 422, as modified by Amendment No. 32, operates as an invalid discrimination against it because the additional amount which the amended regulation allows for pre-retail functions performed by it is not equal to the entire amounts that are available to independent wholesalers for performing the same kind of functions. However, since Amendment No. 32 did no more than adjust favorably to petitioner, the margins which were already embodied in Maximum Price Regulation No. 422 at the time the prior case arose, it did not remove from that regulation the wholesale margin allowance for integrated chain stores. And, apart from the small additional allowance which the Administrator found it equitable to permit for the purchase of fruits and vegetables in large quantities at a particularly

early stage of the distributive process, the regulation was the same after it was amended as it was before. Consequently, in the case at bar, petitioner's objection, which in words is directed against Amendment No. 32 alone, is in reality directed also against the basic wholesale margin allowance incorporated in the regulation, prior to the Amendment, the non-discriminatory character of which smaller allowance was adjudicated in the prior case against petitioner's identical contention.

It is clear, therefore, that the respective contentions made by petitioner in the two cases that the regulation discriminated against it because it allegedly did not fully compensate petitioner for its pre-retail functions, constituted but a single issue. Hence, petitioner's objections with respect to the alleged discriminatory features of the regulation in connection with pre-retail allowances are identical in the two cases, and since that issue was decided against petitioner in the prior case, the court below committed no error in holding that petitioner was barred by the principles of *res judicata* from raising the same issue again in the case at bar. See *Grubb* v. *Public Utilities Commission of Ohio,* 281 U. S. 470; *United States* v. *Moser,* 266 U. S. 236, 241; *Cromwell* v. *County of Sac,* 94 U. S. 351; *In re Barratt's Appeal,* 14 App. D. C. 255.

2. Petitioner's direct objection to Amendment No. 32 appears to be that the additional 1½% allowance provided therein for pre-retail func-

tions performed by it is so inadequate as to render the Amendment generally unfair and inequitable. Petitioner endeavors to support this contention with the statements contained in its protest, which show a disparity between the 1½% additional allowance made available to petitioner by Amendment No. 32 for performing pre-retail functions and the total amount which independent wholesalers may receive for the purchase and resale of goods at the same levels of distribution embraced in petitioner's integrated operation. As has been noted, *supra,* pp. 8–11, this contention is nothing more than the renewal of the attack upon the structure of the regulation, which was found to be without merit in the prior proceeding. Plainly, such comparisons have no real bearing upon the adequacy of the 1½% allowance provided for by Amendment No. 32, since that allowance is but an addition to the allowance for wholesaling functions performed by integrated chain-stores which was included in the historical margins embodied in Maximum Price Regulation No. 422 prior to the time Amendment No. 32 was added to the regulation. It is patent that the disparity existing between the additional 1½% made available by Amendment No. 32 and the total amount received by independent wholesalers does not prove the inadequacy of the combined amounts made available to petitioner by the mark-ups and the Amendment. Hence, petitioner wholly failed to offer any competent evidence that the entire allowance, com-

posed of the amounts contained in the mark-ups and the 1½% provided by Amendment No. 32, is inconsistent with its historical margin experience or is inadequate to compensate it for the pre-retail functions which it performs.

Section 204 (b) of the Emergency Price Control Act, *infra,* pp. 23–24, expressly provides that no regulation shall be set aside in whole or in part unless the complainant establishes to the satisfaction of the court that the regulation is not in accordance with law, or is arbitrary or capricious. In the circumstances, we submit that the court below was clearly right in holding that the burden was on petitioner to show by competent evidence that the regulation was not generally fair and equitable, and that petitioner had wholly failed to meet the burden of proof in this case. Cf. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209.

Petitioner also urges that there was no "substantial basis" for Amendment No. 32 because the statement of considerations which accompanied it at the time of issuance showed that the 1½% allowance was based on a preliminary study, and that the amendment was tentative in nature and designed as a corrective measure pending a further and complete economic survey which was never made. However, Section 2 of the Emergency Price Control Act, *infra,* p. 17, authorizes the Administrator to establish such maximum

prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act, and provides that every regulation shall be accompanied by a statement of considerations involved in the issuance of the regulation. Manifestly, the Act does not require the Administrator to include in the statement of considerations all of the economic data and other facts employed in the formulation of the regulation. Thus, it cannot reasonably be said that the failure of the Administrator to include such material in the statement of considerations relieves a complainant from the statutory burden of showing that the regulation is arbitrary or capricious. In any event, petitioner's contention is answered in the statement made by the Administrator, in denying the protest, that the 1½% allowance was based on figures submitted by the integrated chains themselves, and that in view of the continuing favorable financial position of the chain-store segment of the food industry and the lack of evidence of the inadequacy of the allowance, a further survey was thought unnecessary (R. 32). In the circumstances the court below rightly held that the failure of the Administrator to make a further survey did not relieve the petitioner of its burden of proof.

3. Petitioner asserts (Pet. 21–23) that the decision of the court below in the case at bar is in conflict with the decision of the same court in the case of *Booth Fisheries Corporation* v. *Bowles,*

153 F. 2d 449. In the *Booth Fisheries* case the court below set aside Maximum Price Regulation No. 579, dealing with fresh and frozen fish in so far as it established different maximum prices for sales of these commodities at wholesale by integrated and non-integrated sellers. In the case at bar the court below held simply that petitioner had not proved that the 1½% allowance was so inadequate as to render the regulation not generally fair and equitable (R. 80). The *Booth* case involved the validity of differentiated prices which had been established for persons making sales at the same level of distribution without regard to quantity, and functioning in exactly the same way in a situation where there was no historical price differential. The case at bar does not involve the problem of an alleged discrimination between sellers making sales to intermediate handlers, and there is nothing in the record in the instant case to show that petitioner is denied the same maximum prices as intermediate sellers, if and when it makes sales of fresh fruits and vegetables at an early stage in the distribution process. There is, therefore, no conflict between the two decisions of the court below.

696382—46——3

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition should be denied.

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JUNE 1946.